

16 APR 1976

OGC Has Reviewed

MEMORANDUM FOR THE RECORD

SUBJECT: Potential Bid Protest by [REDACTED]
Basic Facts Only

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1. A meeting was held at 1545, 23 March 1976, in the Procurement Division's Conference Room (OL) with representatives of [REDACTED] who requested an opportunity to present their views regarding a recent contract action. Those in attendance were:

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[REDACTED] Deputy Chief, PD/OL
[REDACTED] OL/PD/P&SCB
[REDACTED] OGC
[REDACTED] COTR, OC-E/SED/FAB
[REDACTED] OC-E/SED/FAB
[REDACTED], Eastern Manager
Home Office

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2. Mr. [REDACTED] stated that [REDACTED] was unsatisfied with the Agency's handling of a recent contract action. Specifically, he stated that [REDACTED] asked him by telephone to quote [REDACTED] prices for certain antennas, which was done. Mr. [REDACTED] responded by stating that he informed Mr. [REDACTED] that the Agency was considering buying certain items and would do so competitively. Mr. [REDACTED] stated essentially that he was asked to quote a price for specified items. It was stated by Mr. [REDACTED] that regarding the Agency's argument the specification was an "or equal" specification that [REDACTED] was not given the opportunity to bid fairly.

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3. Mr. [REDACTED] upon receipt of a procurement request, determined that no sole source justification existed to buy [REDACTED] antennas. He requested, therefore, other antenna makers to quote a price for antennas that were comparable to or "or equal" to the specific [REDACTED] Model [REDACTED] etc. Competition was conducted by phone. The only other company of concern is [REDACTED] replied

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25X1A and provided their catalogue, which was presented to the COTR. Prices for the [] Model [] and the [] Model [] both came from the GSA supply catalogue. The COTR determined that "any one of three antennas would do the job;" thus, he stated, "price was the only factor." Since [] prices were cheaper, the contract was awarded to that company. [], upon learning or suspecting that [] had been awarded the contract for \$72,648 compared to [] quote of \$77,624, expressed dissatisfaction. [] said the procurement was not conducted as an "or equal" buy. Further, that [] equipment was not technically an "or equal" item. ASPR 1-1206.2 details brand name or equal purchase descriptions.

25X1A 4. Mr. [] stated that [] knew it was to be a competitive buy, and that [] had [] current catalogue and price list. Mr. [] denied this and retorted Mr. [] was assuming those facts.

25X1A 5. Specifically, Mr. [] stated when Mr. [] called he believed the Government had already determined that the [] Model [] was to be the antenna it wanted. He said there was no reason to suggest other [] models. Further, he felt it would be improper to "throw rocks at the competition." Mr. [] concluded that he was not given any options, merely asked to quote the price of [] Model [] Mr. McCusker stated that Mr. [] should have realized it was to be competitive procurement and offered recommendations for other models at that time.

25X1A 6. Mr. [] commented that if [] had been aware [] offered its Model [] [] would have offered the [] Model [] which more closely approximated the [] Model [] than it did the []. He briefly stated that a [] Model [] was not an "or equal" of the [] Model [] for many reasons.

25X1A 7. Mr. [] stated he was not aware of the details between Messrs. [] and []. He essentially stated as far as the Agency technical personnel were concerned, "we don't care about height, etc. ... but only whether or not the antenna will do the job." Mr. Mathes said that may be so, but its not an "or equal" procurement. Essentially, [] position is that while it may be true that a [] Model [] will do the job, i.e., it meets the Government's operational requirement, it is not an "or equal."

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8. Mr. [] stated he understood and appreciated [] concern but felt the contract negotiation was conducted properly. He questioned what relief was [] looking for. Mr. [] and Mr. [] stated that while they did not like the word "protest," they did want the contract. Further, they said, if the contract had been awarded, it should be terminated and relet in proper fashion. 25X1A 25X1A

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9. Mr. [] indicated the matter would be taken under advisement. The undersigned stated we would have to confer amongst ourselves and would reply shortly.

[]

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Logistics and Procurement
Law Division
Office of General Counsel

Brand Name or Equal Spec --

B-160332 9 Jan 67 46 Comp Gen 600

B-173522 25 Jan 72 51 Comp Gen _____

B-136991 38 Comp Gen 291 (1958)

ASPR 1.1206-3

B-136999, 38 Comp Gen 291 (1958)

"Or equal" construed to mean that an alternate item must be equal to product specified, insofar as the needs of the agency are concerned, but not necessarily an exact duplicate thereto in detail or performance. B-124587, 5 Dec 55; A-65465, 9 Nov 35. However, the naming of a particular fund should be avoided when it's reasonably possible to describe the needs of the Government in specs with sufficient clarity to apprise bidders of what is required. See 10 Comp Gen 555.

B-160332, 46 Comp Gen 600, 9 Jun 67

Bids - Oral - Procedure -

The assignment of a high priority designator to a procurement does not of itself justify the oral including telephonic solicitation of proposals or quotations permitted pursuant to Paragraph 3-501(c)(ii) ASPR (1967) and the documentation considered a pre-requisition to oral solicitation as well as the prior approval of the oral solicitation at a level higher than C.O. may not be disregarded.

Although the assignment of a priority designation permits the use of "public exigency" exception to formal advertising authorized by 10 U.S.C. 2304(a)(2) without further justification, and the C.O. has considerable discretion to determine the extent of the negotiation consistent with the exigency of the situation. The failure to solicit quotations from the manufacturer of the equipment specified in the name brand or equal provision of the invitation for the procurement reserved for small business concerns without giving the manufacturer an opportunity to protest

size classification that excluded consideration of its brand name product was inconsistent with 10 U.S.C. 2304(g) and Paragraph 3-202.2 ASPR the maximum competition required not having been obtained due to failure to solicit proposal from brand name manufacturer.

B-173522, 51 Comp Gen 431, 25 Jan 72

Discussion with all offerous requirement --
Brand Name or Equal --

... and of K on basis of initial proposal because specs in request for proposal are considered to adequately describe Government requirement was not justified since pursuant to para 3-805-1 ASPR adequate specs are not an exception from the requirement to conduct discussions with all offerors within competitive range and, therefore, prospective contractors submitting proposals that are not materially deficient and can be made acceptable thru minor revisions or modification should be afforded an opportunity to satisfy the Government's requirement rather than closing the door to possible fruitful negotiations and discussions must be meaningful and furnish information to all offerors in a competitive range as to the areas in which their proposals are deficient to enable them to satisfy requirement.

... we further note the RFP sets out ... the brand name or equal clause in ASPR 1-1206.3b. This clause is written for formal advertised procurements and ASPR 1-1206.5 and 3-501(b)C(xxx) authorize its adaption for use in negotiated procurements. However, this clause must be suitable modified for RFP use.

Part 101-26 -- Procurement Sources and Programs

§ 101-26.100-1 Procurement of Lowest Cost Items

GSA provides lines of similar items to meet particular end-use requirements under both its supply distribution system and the Federal Supply schedule program. Although these similar items may differ in terms of price, quality, and essential characteristics, they can often serve the same functional end-use procurement needs of the various ordering agencies. Therefore, in submitting requisitions for an item obtainable from both GSA stock and Federal Supply Schedule contracts, agencies shall utilize the source from which the lowest cost item can be obtained which will adequately serve the functional end-use purpose.

(§ 101-26.100-1 amended 40 FR 41093, 9/5/75, effective 9/5/75.)

§ 101-26.401 Applicability

All executive agencies shall procure needed articles and services from FSS contracts IAW provisions of the appropriate FSS.

(a) The general principles and methods prescribed in this subpart 101-26.4 apply to all such procurements. Consequently, prior to initiating procurement directly from commercial sources, agencies shall determine whether the required commodities and services or similar commodities and services serving the required functional purpose are available from a Federal Supply Schedule.

(b) The GSA Supply Catalogue is a ready reference for information on commodities and services available from Federal Supply Schedules.

§ 101-26.401-1 Mandatory Use of Schedules

Federal Supply Schedules are mandatory to the extent specified in each schedule. The GSA Supply Catalogue provides summary information as to mandatory coverage of each schedule. In the event of any apparent conflict, the provisions of the schedule are governing. Newly developed schedules and some other schedules may be mandatory to only one or to a small number of agencies. One schedule is entirely optional, and is the only exception to mandatory coverage; it is the schedule covering Motor Vehicle Parts and Accessories (FSC Groups 25, 28, 29, 38 and 39).